



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 30, 2012

The Honorable Ruth Jones McClendon
State Representative, House District 120
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

OR2012-11856

Dear Representative McClendon:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 460382.

The Office of State Representative Ruth Jones McClendon received a request for (1) information from a specified time period containing the terms "Sons of Confederate Veterans" (the "SCV"), "Supreme Court Building," "Confederate Pension Fund," or "Texas Building Fund" or relating to an application by the SCV to the Texas Historical Commission or the Travis County Historical Commission for the placement of a marker in or near the Texas Supreme Court Building and (2) records of communications encompassed by part one of the request. You state some of the requested information has been released. You state you have withheld other responsive information pursuant to sections 306.003 and 306.004 of the Government Code.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.106, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the information you submitted.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't

¹We note information subject to sections 306.003 and 306.004 is governed by chapter 306 of the Government Code, not the Act, and the legislator concerned has discretion to either withhold or release such information. See Gov't Code §§ 306.003, .004; Open Records Decision No. 648 at 3-7 (1996).

Code § 552.101. You contend the submitted information is confidential under section 552.101 in conjunction with the legislative privilege, also known as legislative immunity, which generally shields legislative actors from being required to testify about their legislative activities.² See *In re Perry*, 60 S.W.3d 857, 860 (Tex. 2001); see also *Gravel v. U.S.*, 408 U.S. 606, 615-16 (1972) (senator not required to answer questions about events that occurred in senate subcommittee meeting); *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967) (legislators “should be protected not only from the consequences of litigation’s results but also from the burden of defending themselves”). As such, the legislative privilege is a privilege against testifying in discovery or trial. In Open Records Decision No. 575 (1990), this office determined discovery privileges are not covered under the statutory predecessor of the Act. Therefore, you may not withhold any of the submitted information under section 552.101 of the Government Code on the basis of legislative immunity.

Next, we address your claims under sections 552.111 and 552.106 of the Government Code. Section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. This exception encompasses the deliberative process privilege. See Open Records Decision No. 615 at 2 (1993). The purpose of this privilege is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. See *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990). In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, and opinions that reflect the policymaking processes of the governmental body. See ORD 615 at 5. A governmental body’s policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; see also *City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (Gov’t Code § 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body’s policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body’s policy mission. See Open Records Decision No. 631 at 3 (1995). Moreover, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. See ORD 615 at 5. But if factual information is so

²The legislative privilege also refers to a legislator’s immunity from civil liability, immunity from arrest, and legislative continuances. See e.g., TEX. CONST. art. III, § 14 (senators and representatives generally privileged from arrest while traveling to or attending legislative sessions); Civ. Prac. & Rem. Code § 30.003 (court must grant continuance if attorney is a legislative member and will be attending legislative session); *In re Perry*, 60 S.W.3d at 859 (immunity from civil liability).

inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982). We note section 552.111 can encompass communications between or among parties who share a privity of interest or common deliberative process. *See* ORD 561 at 9.

We also have concluded a preliminary draft of a document intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

Section 552.106 of the Government Code excepts from disclosure "[a] draft or working paper involved in the preparation of proposed legislation[.]" Gov't Code § 552.106(a). Section 552.106 resembles section 552.111 in that both exceptions protect advice, opinion, and recommendation on policy matters, in order to encourage frank discussion during the policymaking process. *See* Open Records Decision No. 460 at 3 (1987). However, section 552.106 applies specifically to the legislative process and thus is narrower than section 552.111. *Id.* The purpose of section 552.106 is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body. *Id.* at 2. Therefore, section 552.106 is applicable only to the policy judgments, recommendations, and proposals of persons who are involved in the preparation of proposed legislation and who have an official responsibility to provide such information to members of the legislative body. *Id.* at 1; *see also* Open Records Decision Nos. 429 at 5 (1985) (statutory predecessor to Gov't Code § 552.106 not applicable to information relating to governmental entity's efforts to persuade other governmental entities to enact particular ordinances), 367 at 2 (1983) (statutory predecessor applicable to recommendations of executive committee of State Board of Public Accountancy for possible amendments to Public Accountancy Act). Like section 552.111, section 552.106 does not protect purely factual information from public disclosure. *See* ORD 460 at 2; *see also* Open Records Decision No. 344 at 3-4 (1982) (for purposes of statutory predecessor, factual information prepared by State Property Tax Board did not reflect policy judgments, recommendations, or proposals concerning drafting of legislation). However, a comparison or analysis of factual information prepared to support proposed legislation falls within the scope of section 552.106. *See* ORD 460 at 2.

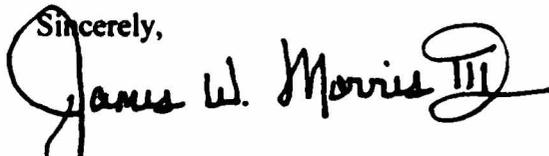
You seek to withhold all of the submitted information under sections 552.111 and 552.106 of the Government Code. You contend the information at issue consists of analysis, advice, opinions, and recommendations concerning policy-related matters. Having considered your

arguments and reviewed the information at issue, we conclude you may withhold the information we have marked under section 552.111 of the Government Code.³ We conclude the remaining information at issue is factual and, as such, may not be withheld under sections 552.111 or 552.106. Therefore, as you claim no other exception to disclosure, the rest of the submitted information must be released.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/bhf

Ref: ID# 460382

Enc: Submitted documents

c: Requestor
(w/o enclosures)

³We note the marked information includes a draft document. You inform us the document has been released in its final form.